

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSIYAH MENO,

Defendants.

Case No. 2:11-cr-00368-JCM-PAL

**REPORT OF FINDINGS AND
RECOMMENDATION**

(Mtn for Hearing - Dkt. #71)

The government's Unopposed Motion for a Status Conference (Dkt. #64) was referred to the undersigned by the assigned district judge, James C. Mahan, pursuant to 28 U.S.C. § 636(b)(1)(A), and Local Rule IB 1-4. The court set the unopposed motion for hearing Tuesday, September 24, 2013. Christina Silva appeared on behalf of the government, and Ozzie Fumo appeared on behalf of Meno, who was present and in custody. The day before the hearing, the court entered an Order to Show Cause (Dkt. #67) requiring the parties to brief the subject matter addressed in the unopposed motion. The court has now reviewed the government's Response (Dkt. #70) to the Order to Show Cause, and Meno's Response entitled a Motion for Hearing Pursuant to 18 U.S.C. § 4246 (Dkt. #71). The court will issue a Report of Findings and Recommendation rather than an order because the scope of a magistrate judge's authority on the issues before the court is unclear.

BACKGROUND

On October 11, 2011, the grand jury returned an Indictment (Dkt. #1) against Defendant Josiyah Meno, charging him with felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2). Meno made an initial appearance on October 11, 2011, was arraigned and pled not guilty to the charge in the Indictment. *See* Minutes of Proceedings (Dkt. #10). Following a detention hearing, Meno was detained pending trial. *Id.*; Order of Detention (Dkt. #14). In an Order (Dkt. #25) entered

1 February 23, 2012, the court granted the government's unopposed Motion for Psychiatric or
2 Psychological Evaluation (Dkt. #24). In that Order, the undersigned directed the U.S. Marshals Service
3 ("USMS") to transport Meno to a suitable facility for a psychiatric examination to determine if he was
4 suffering from a mental disease or defect rendering him mentally incompetent to understand the nature
5 and consequences of the proceedings against him or to assist properly in his defense pursuant to 18
6 U.S.C. §§ 4241(b). The order also required an evaluation of whether Meno was insane at the time of
7 the offense pursuant to 18 U.S.C. § 4242 and 4247.

8 Meno was transported to the Metropolitan Detention Center in Los Angeles, California, where a
9 psychiatric examination was conducted. A forensic evaluation report addressing the issue of
10 competency to stand trial was submitted to the court and counsel. Meno's mental state at the time of
11 the offense was addressed in a separate accompanying addendum.

12 Meno appeared in court for a competency hearing on July 19, 2012. *See Minutes of*
13 *Proceedings* (Dkt. #41). Counsel for both sides agreed, based on the forensic evaluation report, that
14 Meno was incompetent to stand trial because he was unable to understand the nature and consequences
15 of the proceedings against him or to assist properly in his defense. Counsel for the government,
16 Andrew Duncan, requested that Meno be committed to a Federal Medical Center for evaluation and
17 treatment for restoration to competency pursuant to 18 U.S.C. § 4241(d) as recommended in the
18 forensic evaluation report. Counsel for Meno, Osvaldo Fumo, concurred that Meno was unable to
19 understand the nature and consequences of the court proceedings against him and was unable to assist
20 in his defense. Additionally, Mr. Fumo agreed Meno needed treatment to restore him to competency.
21 The court found by a preponderance of the evidence that Meno was presently suffering from a mental
22 disease or defect rendering him incompetent to the extent he was unable to understand the nature and
23 consequences of the proceedings against him, or to assist properly in his defense. The court therefore
24 ordered that Meno be committed to the custody of the Attorney General pursuant to the provisions of 18
25 U.S.C. § 4241(d). The government did not request, and the court did not order, an evaluation regarding
26 whether Meno was a danger to others or property at the competency hearing.

27 A written Order (Dkt. #46) was entered August 1, 2012, committing Meno to the custody of the
28 Attorney General for hospitalization for treatment in a suitable facility for a reasonable period of time,

1 not to exceed four months, to determine whether there was a substantial probability that Mr. Meno
2 could be restored to competency in the foreseeable future pursuant to 18 U.S.C. § 4241(d). Meno was
3 transported to the Federal Medical Center in Butner, North Carolina, (“FMC-Butner”) pursuant to that
4 Order.

5 On February 14, 2013, the court received a report stating that the facility had completed Meno’s
6 forensic study. The warden of the facility sent a cover letter indicating that the report and letter had also
7 been sent to counsel for the government and counsel for Meno. A staff psychologist, staff psychiatrist,
8 and staff neurologist authored the report and opined that Meno was suffering from a mental disease or
9 defect that rendered him mentally incompetent to the extent he could not understand the nature and
10 consequences of these proceedings and could not assist in his defense. The examiners also opined that
11 there was not a substantial probability that Meno could be restored to competency in the foreseeable
12 future. The cover letter from the warden at FMC-Butner indicated that if the court agreed with these
13 opinions and documented that finding in a court order, that Meno would be subject to the provisions of
14 18 U.S.C. § 4246, and that risk assessments pursuant to § 4246 are performed at Federal Medical
15 Centers. *See Sealed Forensic Report (Dkt. #54) at 2.* The letter indicated that the United States
16 Marshals Service (“USMS”) would be notified of the completion of Mr. Meno’s forensic study and the
17 need to transport him to this district for further legal proceedings. The USMS was notified, and Meno
18 was transported to this district for further judicial proceedings.

19 On March 28, 2013, the court set the matter for hearing to determine how counsel proposed to
20 proceed in this case. Andrew Duncan appeared on behalf of the government. Meno was present with
21 his counsel, Mr. Fumo. The government orally requested Meno be subject to another psychiatric or
22 psychological examination by the Bureau of Prisons to determine if his release would create a
23 substantial risk of bodily injury to another person or serious damage to another’s property pursuant to
24 18 U.S.C. §§ 4246 and 4247. Counsel for Meno did not object to the request for a dangerousness
25 evaluation but did object to transferring Meno back to FMC-Butner. He requested the evaluation be
26 conducted locally, where Meno resides and where he has family support.

27 The court granted the government’s oral request to have Meno examined, but denied its request
28 that the Bureau of Prisons conduct the evaluation. The court reviewed the provisions of 18 U.S.C.

§ 4247(b) and granted Meno's request that the psychiatric examination be conducted by a licensed certified psychiatrist in this district for the reasons stated in the court's April 5, 2013, written Order (Dkt. #57). The order directed that Meno be evaluated for purposes of 18 U.S.C. § 4246(a) by a local board certified psychiatrist for a determination of whether Meno's release would create a substantial risk of bodily injury to another person or serious damage to property of another. Counsel for the parties conferred and stipulated to use Dr. Dodge Slagle, the psychiatrist who originally evaluated Meno's competency to stand trial in December 2011.

Dr. Slagle evaluated Meno on April 19, 2013, at the Southern Nevada Detention Center in Pahrump, Nevada. A written psychiatric evaluation was prepared but not provided to the court until it was attached to the August 29, 2013, unopposed Motion for a Status Conference.¹ Dr. Slagle concluded that future long-term dangerousness cannot be predicted with medical certainty, and while there is a potential future risk of danger to others or property, it is not high. Dr. Slagle opined that Meno's mental and physical condition have changed since his brain injury in a way that has substantially reduced his risk of violence.

On April 30, 2013, counsel stipulated to continue the May 1, 2013, calendar call and May 6, 2013, trial, indicating they were awaiting Dr. Slagle's evaluation. *See* Stipulation (Dkt. #59). The district judge approved the parties' Stipulation and continued the trial until August 19, 2013. *See* Order (Dkt. #60). On August 16, 2013, counsel again stipulated to continue the August 19, 2013, trial date, stating, "It is clear from the record that Mr. Meno is not competent to stand trial. Counsel for the government feels that clarification from Dr. Dodge Slagle regarding whether the Defendant is a danger to himself, others or property [sic]." *See* Stipulation (Dkt. #62). The district judge approved the parties' Stipulation and continued the trial to October 7, 2013. *See* Order (Dkt. #65).

On July 16, 2013, Dr. Slagle drafted an addendum to his original report opining that although future human behavior can never be predicted with absolute certainty, it was his professional opinion to a reasonable degree of medical probability that Meno was not a danger to himself, others, or property for reasons summarized in his prior report. The letter addendum was forwarded to counsel for Meno on

¹The report is not dated, and it is not clear exactly when counsel received it.

1 July 18, 2013. *See* facsimile transmittal sheet and addendum, attached to unopposed Motion for Status
2 Conference as Exhibit E. Given the date of the facsimile transmittal, the court was at a loss to
3 understand how the parties could stipulate to a continuance of the August 19, 2013, trial date on the
4 grounds they were awaiting clarification of Dr. Slagle's initial report. At a September 24, 2013, hearing
5 counsel for Meno represented that he did not receive the report until after the parties stipulated to
6 continue the August 19, 2013, trial. Dr. Slagle's office was contacted and indicated the report had been
7 sent in July. However, Mr. Fumo had not received it and therefore requested another copy.

8 After counsel received Dr. Slagle's addendum, the government filed the Unopposed Motion for
9 a Status Conference on August 29, 2013. In the unopposed motion, the government did not request any
10 form of relief from this court. Similarly, Meno did not request any specific form of relief from this
11 court. Rather, counsel for both sides requested a status hearing "to review these issues with the court,"
12 essentially asking that the court figure it out. The motion indicated "Defendant continues to seek
13 dismissal of the case." However, the government was concerned for the safety of the community based
14 on Dr. Slagle's opinion to a reasonable degree of medical probability. In the unopposed motion,
15 counsel for the government acknowledged that if the case was dismissed, the court could order
16 treatment for Meno, but "the type and frequency of the treatment program are unclear from Dr. Slagle's
17 report and letter."

18 The court set the matter for hearing on September 24, 2013, as requested. In preparing for the
19 hearing, it did not appear from the court's initial research that Meno was subject to the provisions of 18
20 U.S.C. § 4246 because the director at FMC-Butner had not certified that Meno was presently suffering
21 from a mental disease or defect as a result of which his release would create a substantial risk of bodily
22 injury to another person, or serious damage to the property of another. *See* § 4246(a). Additionally, it
23 did not appear from the court's preliminary research that the other three circumstances described in
24 § 4246(a) applied to Meno. Therefore, on September 23, 2013, the court entered an Order to Show
25 Cause (Dkt. #67) referring the parties to the Ninth Circuit's decision in *United States v. Godinez-Ortiz*,
26 563 F.3d 1022 (9th Cir. 2009), and directing the parties to show cause why the Indictment (Dkt. #1)
27 should not be dismissed and Meno released from federal custody.

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At the September 24, 2013, status conference, Cristina Silva appeared on behalf of the government, and Ozzie Fumo appeared on behalf of Meno who was present and in custody. *See* Minutes of Proceeding (Dkt. #69). The court addressed the parties' failure to request any form of relief from this court and gave counsel until the end of the week to file a written response to the order to show cause why the procedure outlined by the Ninth Circuit in *Godinez-Ortiz* should not be ordered. At the hearing, counsel for Meno made an oral motion to release Meno from custody, which the court denied.

DISCUSSION

I. The Parties' Positions.

The government response to the order to show cause maintains that the Insanity Defense Reform Act of 1984, codified at 18 U.S.C. § 4241-47, "is imprecise regarding exactly what procedure the Court should follow" in Meno's circumstances. However, it is the government's position that the Indictment should not be dismissed. Rather, the court should order Meno returned to the Bureau of Prisons for a dangerousness evaluation under 18 U.S.C. § 4246(a). The government's response to the order to show cause appears to argue that Meno is a person committed to the custody of the Attorney General pursuant to § 4241(d) which gives this court jurisdiction to order the dangerousness evaluation.

The government asserts that the Director at FMC-Butner did not file a certificate of dangerousness because the court did not direct a dangerousness evaluation be conducted by a Bureau of Prisons ("BOP") facility. The government is unwilling to dismiss the Indictment against Meno without a BOP determination of whether or not Meno's release would create a substantial risk of bodily injury to another person or serious damage to property of another. Without such a determination, the government argues, it cannot make a recommendation regarding disposition of this case as outlined in 18 U.S.C. § 4246(d) and (e). The government's response to the order to show cause does not address the Ninth Circuit's decision in *Godinez-Ortiz*. However, the government asks that the court not dismiss the Indictment.

The government acknowledges that this is an old case and that the calendar call and trial date are fast approaching. However, the government argues that because Meno has been determined incompetent to stand trial and requires a further evaluation under 18 U.S.C. § 4246(a), further delay of these proceedings is excludable time under 18 U.S.C. §§ 3161(h)(1)(A) and (F) of the Speedy Trial Act.

1 The government therefore requests that the court order Meno into the custody of the Attorney General
2 for an evaluation under 18 U.S.C. § 4246(a) to determine if Meno's release would create a substantial
3 risk of bodily injury to another person or serious damage to property of another. The government
4 requests that the court order Meno returned to FMC-Butner for a period not to exceed forty-five days, to
5 give the facility director the opportunity to file a dangerousness certificate pursuant to 18 U.S.C.
6 § 4246, and commence federal civil commitment proceedings.

7 Meno's response to the order to show cause argues the court should conduct a hearing pursuant
8 to 18 U.S.C. § 4246(c). Counsel for Meno asserts that at the March 28, 2013, hearing following
9 Meno's return from FMC-Butner, the government indicated it intended to dismiss the indictment.
10 However, the government requested an evaluation under 18 U.S.C. §§ 4246 and 4247 to determine
11 whether Meno's release would create a substantial risk of bodily injury to another person or serious
12 damage to another property. Counsel for Meno maintains that because the government expressed an
13 intention to dismiss the Indictment, he agreed to such an evaluation. That evaluation was conducted
14 locally by Dr. Slagle who has now completed his evaluation and concluded that future long-term
15 dangerousness cannot be predicted with medical certainty, and while there is always a potential future
16 risk of danger to others or property the risk, is not high. Dr. Slagle also opined that Meno's brain injury
17 has caused mental and physical limitations that substantially reduce his risk of violence.

18 Counsel for Meno indicates that he did not file a motion to dismiss because he believed the
19 government would move to dismiss once a dangerousness evaluation was completed. The
20 dangerousness evaluation has now been done by Dr. Slagle. The director at FMC-Butner had Meno
21 transferred back to this district for further judicial proceedings after determining Meno was not likely to
22 be restored to competency within the foreseeable future, but did not file a certificate under § 4246(a)
23 which would trigger civil commitment proceedings.

24 Meno argues that § 4246(a) authorizes, but does not require, the director of FMC-Butner to file
25 a certification regarding whether Meno represents a substantial risk of bodily injury to another person or
26 serious damage to property of another. Meno maintains that the plain language of § 4246(a) makes it
27 clear that although a certificate may be filed, it is not a condition precedent to conducting a hearing
28 under 18 U.S.C. § 4246(d). Rather, 18 U.S.C. 4246(b) allows for a psychiatric or psychological

1 examination to assist the court in determining whether there is clear and convincing evidence Meno
2 represents a substantial risk of bodily injury to another person or serious damage to property of another.
3 The court's April 5, 2012, order directed Dr. Slagle to conduct an examination in accordance with the
4 requirements of 18 U.S.C. §§ 4241, 4246, 4247, and 4248. The examination that Dr. Slagle conducted
5 was the risk assessment.

6 Meno acknowledges that the Ninth Circuit's decision in *Godinez-Ortiz* allows the district judge
7 to recommit the defendant to the custody of the Attorney General for a dangerousness evaluation.
8 However, Meno reads the decision to suggest that "the opposite is true as well," that is, nothing requires
9 this court to recommit a defendant in Meno's position to the custody of the Attorney General for a
10 dangerousness evaluation. Thus, the court has the authority to conduct a dangerousness hearing under
11 § 4246(d). Meno asks the court to conduct such a hearing to determine whether there is clear and
12 convincing evidence that Meno is presently suffering from a mental disease or defect as a result of
13 which his release would create a substantial risk of bodily injury to another person or serious damage to
14 property of another.

15 Meno also argues that the director of FMC-Butner returned Meno to this district without a
16 certificate that he was a danger. Thus, it is counsel's position that "the certificate complies with the
17 requirement of § 4246 and a hearing to determine danger can be held pursuant to § 4246(c)." He
18 argues, in the alternative, that "the provisions of § 4246(a) are not required because the Government
19 refuses to dismiss the Indictment."

20 In short, Meno argues that the court should conduct a hearing under 18 U.S.C. § 4246(c) and
21 make a determination whether there is clear and convincing evidence Meno represents a substantial risk
22 of bodily injury to another person or serious damage to property of another. Citing *United States v.*
23 *Sahhar*, 917 F.2d 1197, 1205 (9th Cir. 1990), Meno argues that if the court finds Meno does not
24 represent a substantial risk of danger, he is entitled to be released. Counsel for Meno agrees after
25 reviewing unspecified "applicable case law" that it does not appear the court can require that the
26 Indictment be dismissed. Therefore, he is simply asking to be released with or without conditions. If
27 the court finds clear and convincing evidence he represents a substantial risk, then the court may
28 commit him to the custody of the Attorney General pursuant to 18 U.S.C. §§ 4246(d)(1) and (2). If

1 Meno is committed to the custody of the Attorney General because he represents a risk, the Attorney
2 General will then release him to the state to assume custody and treatment.

3 **II. Applicable Law.**

4 The parties have agreed, and the court has found, that Meno is incompetent to stand trial. The
5 parties have also agreed, and the court has found, that Meno is unlikely to be restored to competency
6 within the foreseeable future. The due process clause of the Fifth Amendment prohibits trying a
7 defendant who is mentally incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Pate v.*
8 *Robinson*, 383 U.S. 375, 378 (1966).

9 The treatment of offenders suffering from a mental disease or defect is governed by the Insanity
10 Defense Reform Act of 1984, 18 U.S.C. §§ 4241-48. The federal criminal code establishes a multi-part
11 statutory scheme for addressing offenders suffering from a mental disease or defect who have pending
12 federal charges. If a question is raised concerning whether a defendant is competent to stand trial or
13 assist in his defense, the court first determines whether the defendant suffers from a “mental disease or
14 defect rendering him mentally incompetent to the extent that he is unable to understand the nature and
15 consequences of the proceedings against him, or to assist properly in his defense.” 18 U.S.C. § 4241(a)
16 and (d); *see also United States v. Friedman*, 366 F.3d 975, 978 (9th Cir. 2004). Section 4241(a)
17 provides that whenever the court has reasonable cause to believe a defendant is suffering from a mental
18 disease or defect rendering him unable to understand the nature and consequences of the proceedings
19 against him or to assist properly in his defense, the court shall conduct a hearing to determine the
20 defendant’s competency.

21 Second, if the court finds that a defendant is mentally incompetent to understand the nature and
22 consequences of the proceedings against him, or to assist properly in his defense, the statute requires
23 that the court commit the defendant to the custody of the Attorney General. 18 U.S.C. § 4241(d). In
24 such circumstances, the Attorney General is required to hospitalize the defendant for treatment for a
25 reasonable period of time, not to exceed four months, necessary to determine whether there is a
26 substantial probability that the defendant will become competent to stand trial within the foreseeable
27 future. 18 U.S.C. § 4241(d)(1); *see also United States v. Loughner*, 672 F.3d 731, 766 (9th Cir. 2012).
28 If the court finds by a preponderance of the evidence that the defendant is incompetent, it shall commit

1 him to the custody of the Attorney General for treatment. 18 U.S.C. § 4241(d). The defendant may be
2 hospitalized for a reasonable time, not to exceed four months, “to determine whether there is a
3 substantial probability that in the foreseeable future he will attain the capacity to permit the trial to
4 proceed.” 18 U.S.C. § 4241(d)(1).

5 Third, if the determination is made after the statutory period that it is not possible to restore the
6 defendant to competency within the foreseeable future, the defendant is subject to the provisions of
7 §§ 4246 and 4248². If, at the end of this period, the court determines that defendant’s mental condition
8 has not improved sufficiently for trial to proceed, the defendant becomes subject to the provisions of
9 § 4246. 18 U.S.C. § 4241(d).

10 Meno was found incompetent to stand trial and was committed to the custody of the Attorney
11 General to determine whether he could be restored to competency within the foreseeable future. He
12 was returned to this district after the evaluators at FMC-Butner determined he could not be restored to
13 competency within the foreseeable future. Counsel for Meno and the government agree that Meno is
14 incompetent to stand trial and is unlikely to be restored to competency in the foreseeable future, and the
15 court has so found. It is black letter constitutional law that the due process clause of the United States
16 Constitution precludes Meno from being tried or convicted. *See Pate v. Robinson*, 383 U.S. 375, 378
17 (1966); *Bishop v. United States*, 350 U.S. 961 (1956).

18 Where, as here, a defendant has been found incompetent to stand trial and not likely to be
19 restored to competency within the foreseeable future, the Insanity Defense Reform Act authorizes the
20 court to order an evaluation under § 4246(a) to determine whether a defendant “is presently suffering
21 from a mental disease or defect as a result of which his release would create a substantial risk of bodily
22 injury to another person or serious damage to property of another.” 18 U.S.C. § 4246(a).

23 In this case, Meno has been found incompetent to stand trial, and unlikely to be restored to
24 sanity within the foreseeable future. Both sides agree that pursuant to § 4241(d)(2)(B) where, as here,
25 Meno’s mental condition has not so improved that trial may proceed, and the court has found there is no
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27 ²Section 4248 involves civil commitment of sexually dangerous persons and does not apply to
28 this case.

1 substantial probability that he will be restored to sanity in the foreseeable future, § 4246 applies to
2 Meno's situation.

3 The fourth step of the federal statutory scheme addressing offenders with mental diseases or
4 defects contemplates a determination by the director of an FMC facility about whether the defendant's
5 release would create a substantial risk of bodily injury to another person, or serious damage to property
6 of another. If a defendant has been found incompetent to stand trial, and not capable of being restored
7 to competency within the foreseeable future, § 4246(a) authorizes the court to transport the defendant to
8 be returned to an FMC facility to determine whether the defendant would pose a "substantial risk of
9 bodily injury to another person or serious damage to property of another" if released. 18 U.S.C.
10 § 4241(d)(1); *see also United States v. Godinez-Ortiz*, 563 F.3d 1022, 1032 (9th Cir. 2009). The statute
11 also requires the director to determine whether suitable arrangements for state custody and care are
12 available.

13 If the director files a certificate that the defendant is a substantial risk of bodily injury to another
14 or serious damage to property, the court is required to hold a hearing to determine whether the person
15 is, in fact, dangerous as alleged. 18 U.S.C. § 4246(a). If the court determines the person is dangerous
16 as alleged, the person may be civilly committed even though he has not been tried or convicted of a
17 criminal offense. "Section 4246 allows for continued hospitalization for federal inmates due for release
18 but previously committed for treatment of mental disease or defect." *Weber v. United States District*
19 *Court*, 9 F.3d 76, 78 (9th Cir. 1993).

20 The civil commitment procedure outlined in § 4246 applies to three categories of hospitalized
21 individuals:

- 22 (1) those whose sentence is about to expire;
- 23 (2) those who are committed for restoration of mental competency to stand trial under 18
24 U.S.C. § 4241(d); and
- 25 (3) those whose criminal charges have been dismissed solely based on their mental
26 condition.

27 18 U.S.C § 4246(a); *Weber*, 9 F.3d at 78.

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1 In *Weber*, the Ninth Circuit found that the district court lacks authority to initiate a hearing to
2 determine dangerousness without a certificate from the director of the facility. *Id.* at 79. The Ninth
3 Circuit stated that § 4246 requires “that the director of the facility is to make the initial determination
4 regarding the dangerousness issue.” *Id.*

5 In this case, the director at FMC-Butner has not filed such a certificate or opined that Meno is a
6 danger. Rather, FMC-Butner completed the four-month evaluation to determine whether Meno could
7 be restored to competency in the foreseeable future and notified the court and counsel for both sides
8 that Mr. Meno was subject to the provisions of § 4246. The cover letter which accompanied the
9 forensic evaluation report advised the court and counsel for both sides that if the court agreed with the
10 evaluators’ opinion that Meno was not likely to be restored to competency within the foreseeable future,
11 and documented that finding in a court order, that FMC-Butner would conduct the risk assessment
12 pursuant to § 4246.

13 In retrospect, the most efficient, cost-effective, and time-saving approach would have been for
14 the parties to stipulate, and the court to order, that the director of FMC-Butner conduct a dangerous
15 evaluation required by § 4246(a) without returning Meno to this district for a formal hearing to make
16 findings that Meno was unlikely to be restored to competency within the foreseeable future. The court
17 does not fault counsel for failing to arrive at this conclusion. Section 4246 lacks clarity and direction
18 concerning what procedure a district court must follow after a defendant has completed his four-month
19 period of hospitalization under § 4241(d) if: (a) the facility where the defendant was hospitalized
20 determines that there is not a substantial probability that in the foreseeable future, defendant will be
21 restored to competency; and (b) the director of that facility has not filed a certificate pursuant to §
22 4246(a) stating the defendant is presently suffering from a mental disease or defect the result of which
23 would create a substantial risk of bodily injury to another person or serious damage to another person’s
24 property. The risk assessment was not done because the director at FMC-Butner did not have a court
25 order directing it or a judicial determination that Meno was not likely to be restored to competency in
26 the foreseeable future.

27 When Meno was returned to this district, this court granted Meno’s request to have a local
28 licensed psychiatrist conduct a dangerousness evaluation. The court granted this request pursuant to

1 § 4247(b) which provides:

2 **Psychiatric or psychological examination.** A psychiatric or psychological examination
3 ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist
4 or psychologist, or, if the court finds it appropriate, by more than one such examiner.
5 Each examiner shall be designated by the court, except that if the examination is ordered
6 under §§ 4245, 4246, or 4248, upon the request of the defendant, an additional examiner
7 may be selected by the defendant.

8 *Id.*

9 The authority to order an examination by a local, licensed, certified psychiatrist upon the
10 defendant's request does not, however, eliminate the statutory requirement that a dangerousness
11 assessment be conducted by the director of an FMC facility. The court expected that counsel for the
12 government would follow the procedure approved by the Ninth Circuit in *Godinez-Ortiz* and move to
13 dismiss the pending criminal charge against Meno to trigger the § 4246(a) process. If the charges
14 against Meno are dismissed, he qualifies for a 4246(a) dangerousness evaluation at an FMC as a person
15 whose criminal charges have been dismissed solely for reasons related to his mental condition. Instead,
16 the government has asked that the defendant be sent back to FMC-Butner for the dangerous evaluation
17 while leaving the charges pending.

18 The court will recommend that the procedure approved by the Ninth Circuit in *Godinez-Ortiz* be
19 followed in this case. Specifically, the court recommends: (1) that the Indictment against Meno be
20 dismissed; (2) that Meno be returned to FMC-Butner or other FMC to provide the facility director with
21 the opportunity to re-evaluate him and issue a dangerousness certificate pursuant to 18 U.S.C. § 4246 if
22 appropriate; and (3) that the district court stay its dismissal order until after the risk assessment has been
23 made. Like Meno, *Godinez-Ortiz* was found incompetent to stand trial and committed to the custody of
24 the Attorney General pursuant to 18 U.S.C. § 4241(d) for hospitalization and treatment for a period not
25 to exceed four months to determine whether there was a substantial probability that he could be restored
26 to sanity within the foreseeable future. Like Meno, *Godinez-Ortiz* was returned to the charging district
27 after the evaluators at FMC-Butner opined there was no substantial probability that he could be restored
28 to competency in the foreseeable future. The government moved to dismiss the charges against
29 *Godinez-Ortiz* and also moved that he be returned to FMC-Butner to provide the facility director with

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1 the opportunity to re-evaluate him and issue a dangerousness certificate pursuant to 18 U.S.C. § 4246, if
2 appropriate.³

3 On a mandamus petition to the Ninth Circuit, Godinez-Ortiz argued that the district court lacked
4 authority to commit him and commence a § 4246(a) dangerousness evaluation because: (1) the director
5 had not filed a certificate with the clerk of the court in the district where he was confined; (2) he was
6 not hospitalized at FMC-Butner at the time; and (3) the dangerousness evaluation had already occurred.
7 The Ninth Circuit rejected all of these arguments. It held that a district court where the criminal case is
8 pending had authority to recommit a defendant to the custody of the Attorney General for a
9 dangerousness evaluation. The Ninth Circuit held that § 4246 did not require that the director's
10 certificate be filed during the person's commitment under § 4241 or before the § 4241(d) evaluation
11 period ends. 563 F.3d at 1031-32. ("Nowhere does § 4246 state that the director's certificate must be
12 filed during the person's commitment under § 4241 or before the § 4241(d) evaluation ends"). The
13 Ninth Circuit also held that the fact that Godinez-Ortiz was no longer hospitalized at FMC-Butner did
14 not deprive the court authority to recommit him for a dangerousness evaluation. The court found that
15 the defendant had only been temporarily transported from FMC-Butner to the district court where the
16 charge was pending for a hearing to determine whether he could be involuntarily medicated to restore
17 competency. *Id.* The district judge found the defendant could not be involuntarily medicated and that
18 there was no substantial probability he would obtain competency in the foreseeable future. *Id.* The
19 Ninth Circuit found that Godinez-Ortiz had not been discharged from FMC-Butner, and he was
20 therefore still in the custody of the Attorney General for hospitalization. *Id.* at 1025, 1031. The court
21 observed that if the district judge had not ordered Godinez-Ortiz returned to FMC-Butner after making
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24 ³*Godinez-Ortiz* involved an additional issue not present here. While Godinez-Ortiz was at FMC-
25 Butner to determine whether he could be restored to competency, officials there determined he was not a
26 danger to himself or others while in the hospital environment, and therefore did not require involuntary
27 medication. The evaluators concluded that Godinez-Ortiz could potentially gain competency with the
28 treatment of anti-psychotic medications, and requested permission from the district court in the charging
district to involuntarily medicate Godinez-Ortiz for that purpose. Godinez-Ortiz was returned to the
charging district and a hearing held at which the district court concluded that Godinez-Ortiz could not be
involuntarily medicated.

1 the finding he was not likely to be restored to competency in the foreseeable future, that no opportunity
2 for a dangerousness evaluation would have existed. The Ninth Circuit also found that “the fact that he
3 was temporarily in California for the purposes of a hearing rather than at FMC-Butner did not remove
4 him from custody, and did not mean he was no longer subject to § 4246.” *Id.* The Ninth Circuit
5 concluded that the district court acted within its authority to temporarily return Godinez-Ortiz to FMC-
6 Butner to provide the director with an opportunity to consider whether to issue a dangerousness
7 certificate pursuant to § 4246.

8 This case is now two years old. Meno was originally charged in a complaint filed October 6,
9 2011, and made his initial appearance and arraignment and plea on the Indictment (Dkt. #7) on October
10 11, 2011. The trial date was initially set for December 5, 2011, and has been continued seven times.
11 The government has never disputed that Meno is incompetent to stand trial or that he is unlikely to be
12 restored to competency within the foreseeable future. Thus, Meno cannot be tried. Both sides agree,
13 and it is clear, that a person in Meno’s situation who has been found incompetent and unlikely to be
14 restored to competency in the foreseeable future is subject to the mandatory provisions of § 4246(a). A
15 dangerousness evaluation must be conducted at an FMC facility, and the director of the facility must be
16 given an opportunity to consider whether to issue a dangerousness certificate pursuant to § 4246. The
17 government’s response to the court’s order to show cause does not address *Godinez-Ortiz* or provide
18 any articulated reasoning why the procedure authorized by *Godinez-Ortiz* should not be ordered here.
19 Accordingly, the court will recommend that the procedure authorized by the Ninth Circuit in *Godinez-*
20 *Ortiz* be followed in this case.

21 CONCLUSION

22 The court has found, and the parties agree, that Meno is incompetent to stand trial and cannot be
23 restored to competency within the foreseeable future. The Ninth Circuit has stated that this court lacks
24 authority to conduct a dangerousness hearing without a certificate from the director of the facility under
25 § 4246(a). *Weber*, 9 F.3d at 78. The director of FMC-Butner was not asked to make a dangerousness
26 evaluation during the period of time Meno was committed for hospitalization to determine whether he
27 could be restored to competency. Under these circumstances, *Godinez-Ortiz* held that a dangerousness

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1 evaluation is required, and that this court has the authority to recommit Meno to an FMC facility for
2 this purpose.

3 For the reasons stated,

4 **IT IS RECOMMENDED** that:

- 5 1. Meno's Motion for a [Dangerousness] Hearing (Dkt. #71) be **DENIED**.
- 6 2. The Indictment (Dkt. #1) be **DISMISSED** solely for reasons related to Meno's mental
7 condition.
- 8 3. The Order dismissing the Indictment be **STAYED** while the facility director at FMC-
9 Butner, or other Federal Medical Center, has the opportunity to conduct a risk
10 assessment of Meno and issue a dangerousness certificate pursuant to 18 U.S.C. § 4246,
11 if appropriate.
- 12 4. Meno be returned to FMC-Butner, or other Federal Medical Center, for a period not to
13 exceed forty-five days from the date Meno arrives at the designated medical facility and
14 exclusive of transportation time, for a psychological and/or psychiatric assessment
15 (dangerousness evaluation) under 18 U.S.C. § 4246.
- 16 5. The psychiatric and/or psychological report (dangerousness evaluation) be filed with the
17 court pursuant to 18 U.S.C. §§ 4247(b) and (c).
- 18 6. Pursuant to 18 U.S.C. § 4247(c)(4)(C), the report shall contain an assessment of
19 whether Meno is presently suffering from a mental disease or defect as a result of which
20 his release would create a substantial risk of bodily injury to another person or serious
21 damage to property of another.
- 22 7. The report shall be filed with the court with copies provided to counsel for Meno and
23 counsel for the government.

24 Dated this 4th day of October, 2013.

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28 PEGGY A. GREEN
UNITED STATES MAGISTRATE JUDGE